

1
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1415 OF 2003
IN
SUIT NO. 1378 OF 2003

Hindustan Lever Ltd., .. Plaintiffs.

vs.

Bombay Tea Co. & Anr. .. Defendants.

Mr. Amit Jamsandekar i/by Crawford Bayley & Co.
for the plaintiffs.

Mr. Mahendra Shah a/w G.C. Mohanty
for defendants.

CORAM : S.U.KAMDAR, J.

DATE : 18th January, 2006.

P.C.

. The present suit is filed for injunction for Copyright and passing off in respect of a design and get up of a label "SUPER DUST" Brooke Bond tea. It is the case of the plaintiffs that the plaintiffs have created this artistic work from one Mr. E.J. Clemen and he was Creative Controller and he was employed with the Creative Agency. It is the case of the plaintiffs that a deed of assignment dated 10.1.2003 was executed for the said artistic work to

use as a design for commercial purposes. It is the further case of the plaintiffs that though the said deed of assignment was taken in 2003, the artistic work was created in April 1995 as set out in the Covenant (E) to the said deed of assignment and thereafter from 1995 till today they were using the said design and getup of the box for the purpose of 'Super Dust' Brooke Bond tea. In Exhibits C and D to the plaint the plaintiffs have given the sales figures and advertisements figures in respect thereof. In para 9 of the plaint it has been contended that they have started using the said artistic work on carton and/or label on the packs for selling their products since April, 1995. The plaintiffs have sold its products under the said label on an extensive scale and they have acquired a distinctive colour scheme, get up and lay out with the background of dark green, rays emanating from the Oval in yellow colour on which the trade mark "SUPER DUST" is written in red colour.

2. On the aforesaid basis, an injunction is sought against the defendant from using their get up on the boxes under the trade name "Super Gold" with similar colour of yellow and green and with a cup of tea thereon. It is a further case of the plaintiff that they have started the modified design and modified get up in the name of "A1 Super Dust" from 2003 and, therefore, they are entitled to the

injunction. However, it is an admitted position that now the plaintiffs have themselves changed the entire get up of the scheme on the said box and now they are in the market with different colour scheme and different get up and different name "Taza Super Dust Tea".

3. The Defendants have filed an affidavit in reply and have contended that it is not true that the plaintiffs have started use of the said artistic work in 1995. It has been pointed out that the said deed of assignment is itself of 2003 and no material or record is produced by the plaintiff to show that in fact the said item with the said get up of "SUPER DUST Tea" was in market in 1995. It is contended by the learned counsel for the defendants that the figures of sales mentioned in Chartered Accountant's certificate by itself does not disclose or indicate that the said carton with "Super Dust Tea" were in market in 1995 to 2002. It has been contended that particularly in the light of the fact that the deed of assignment is of 2003 it was the duty of the plaintiffs to establish on evidence that the said cartons were in the market of the said get up prior to 2003.

4. The learned counsel for the defendants has further contended that in so far as defendants design is concerned they themselves have got the same

designed from one Mr. B.S. Narayan and he has created the said design in February 1995. It has been contended that there was a deed of assignment executed in favour of the defendants by the said Narayan on 15.2.1995. The said deed of assignment has been brought on record. The defendants have also produced bill dated 24.2.95 indicating that the said cartoons were printed of 14000 of 250 gms and 20,000 of 100 gms and thereafter they have been selling the said goods in the market. The defendants have also produced large number of bills which show that the said goods of the defendants were sold in the market under the trade name 'Super Gold' with the design which is set out in the affidavits which are produced before me. It is thus the case of the defendants that the defendants are prior user of the said get up and design and as such the plaintiffs are not entitled to any order of injunction on the ground of passing off of the plaintiffs design by the defendants. It has also been contended by the learned counsel for the defendants that the defendants having established their source from number of documents and that the deed of assignment which was obtained as far back as 1995 and having established that they were in the market since 1995 with the said get up, the plaintiffs are not entitled to injunction as the plaintiffs have failed to establish that they were in market since 1995 with the said get up on the

carton boxes.

5. Having considered rival contentions of the parties, I am of the opinion that plaintiffs have neither produced any material to establish and show that the cartons were printed by them and put in the market under the trade name "SUPER DUST" with the said colour scheme nor produced any material to show that the said cartons were available in the market during the period 1995 to 2002. Mere statements in para 9 of the plaint which are specifically denied by the defendants in para 12 of the affidavit in reply cannot be accepted. The plaintiffs have miserably failed in producing any material or evidence to show that the aforesaid get up and packaging and the colour scheme was in market prior to the defendants herein. Apart therefrom, from the assignment itself which has been annexed as Exhibit A to the plaint it is clear that the design was created by the Artist E.J. Clement only in April 1995 because recital "E" of the said deed of assignment states as under :-

E. In the course of his duties and employment and as part of his engagement, the Artist has created during April, 1995 the painting, graphic or other commercial art as more particularly described in the Schedule hereunder written and hereinafter

referred to as "the said painting / art work". The said painting / art work had been created by the Artist for and on behalf of the Company for valuable consideration (in the form of salary) received by the Artist through the Creative Agency during the aforesaid period for the sole and exclusive benefit, title, interest of the Company."

Whereas in the present case, the defendants assignment is even much prior to the creation of the design of the plaintiffs which has been dated 15.2.1995. Apart therefrom the defendants have also established that they had in fact put the said "Super Gold" in the market with the said colour scheme by producing material for printing as well as various bills for sale to the parties. As against that the plaintiffs did not bring any material on record to show that actually the very carton with the same get up was in the market from 1995 to 2002. When admittedly their deed of assignment is of 2003, it was necessary for the plaintiffs to establish that though the deed of assignment was of 2003, they were user of the said get up and colour scheme prior to 2003. The plaintiffs having failed to establish the same with the further fact that the plaintiffs have admitted changed in the get up and had put in new get up with the name "Taza Dust Double"

different in get up and look than 'Super Gold' which has been sold by the defendants it is not possible to grant any interim relief to the plaintiffs herein. In that light of the matter, motion dismissed. No order as to costs.